SUPREME COURT, U. S.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

NO. 74-310

STANDARD FORGE AND AXLE COMPANY, INC.,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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NO.

STANDARD FORGE AND AXLE COMPANY, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Standard Forge and Axle Company, Inc., Petitioner herein, by and through its undersigned counsel, petitions this Court for a Writ of Certiorari to review the Decision of the United States Court of Appeals for the Fifth Circuit, entered in this case on July 15, 1974, reversing

Orders entered against Respondent by the United States District Court of the Middle District of Alabama.

OPINIONS BELOW

The Opinion of the Court of Appeals (App. A., infra, pp. 1A-11A)[1/] is reported at 8 FEP Cases 369. The Orders of the District Court (App. C, infra, 14A-16A and App. D., infra, 17A-21A) are reported at 6 FEP Cases 554.

JURISDICTION

The Decision of the Court of Appeals was rendered on July 15, 1974; the Judgment of the Court of Appeals was entered on July 15, 1974 (App. B., infra, pp. 12A-13A). On August 9, 1974, the Court of Appeals granted Petitioner's Motion For Stay of Issuance of Mandate and, this has since been extended to and including September 23, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Under the Federal Rules of Civil Procedure, may the satisfaction of juris-

1/ References to the Appendix are "App.".

dictional prerequisites by the Equal Employment Opportunity Commission be alleged generally under Rule 9(c) or must it be alleged specifically and factually under Rule 8(a)(1)?

When a question concerning its jurisdiction arises, may a district court, in exercising its discretion in inquiring into and deciding whether it has jurisdiction, require a plaintiff to give a more definite statement alleging specifically and factually the satisfaction of all possible statutory jurisdictional prerequisites for the suit?

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 (42 U.S.C. §2000e, *et seq.*), insofar as is here pertinent, provides:

> Section 2000e-5(b). Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer. . .has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date,

place and circumstances of the alleged unlawful employment practice) on such employer. . .(hereinafter referred to as the 'respondent') within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. . . .If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion. . . . The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge. . .

Section 2000e-5(f)(1). If within thirty days after a charge is filed with the Commission. . .the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent. . .

> If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . .The Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission. . .shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (b) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. . . .Upon timely application, the court may, in its discretion, permit the Commission. . .to intervene in such civil action upon certification that the case is of general public importance.

STATEMENT OF THE CASE

I. The Factual Background

The Complaint in this case was filed on May 3, 1973 by Respondent (hereinafter the EEOC). It contained an allegation

that "all conditions precedent to the institution of this lawsuit have been fulfilled." Petitioner filed on June 8, 1973, motions to dismiss including a motion to dismiss for lack of jurisdiction or alternatively for a more definite statement, supported by an affidavit, in regard to the meeting of jurisdictional prerequisites. The EEOC filed briefs in response, also supported by an affidavit. Oral argument was had on these motions on June 29, 1973. The motion for more definite statement was granted. Attempts thereafter by the parties with the aid of the Court were fruitless in determining the proper content of the more definite statement. Another hearing was held on July 25, 1973, on this matter and thereafter an Order (App. C., infra, pp. 14A-16A) was filed on July 31 specifying the contents of the more definite statement. The EEOC refused to obey this Order and Petitioner moved to dismiss for failure to obey the Order. EEOC did not respond to this motion. An Order was entered September 14, 1973 dismissing the action (App. D., infra, pp. 17A-21A). Thereafter an appeal was taken.

II. The Decision and Orders of the District Court.

The District Court, in response to

Petitioner's motions, focused on the question of determining "the necessary jurisdictional facts." (App. D., infra, p. 17A). The Court required a more definite statement "because this Court had serious questions as to whether said cause was properly before the Court." (App. D., infra, p. 18A). The Court reasoned that since it was "a court of limited jurisdiction", it should require "a statement of the grounds upon which the Court's jurisdiction depends" and not be content with "sweeping generalities" but rather require "sufficient jurisdictional facts in order for the Court to have the power to entertain the action" (App. D., infra, p. 18A). Its purpose was "to simplify and expedite the litigation of this cause" by requiring "said information at an early stage of the proceedings". (App. D., infra, p. 19A). It was seeking to have a full basis on which to determine its jurisdiction as speedily as possible in a way that would cause the least "hardship and expense" (App. D., infra, p. 20A) to the parties and in a way from which the parties "would suffer no harm" (App. D., infra, p. 19A). Thus, it spelled out what the more definite statement should contain (App. C.,infra, pp. 14A-16A). The Court's efforts were fruitless because Respon-

dent EEOC refused to file the more definite statement required and the Court therefore dismissed the cause for failure to obey its order.

III. The Decision of the Court of Appeals.

The Court of Appeals held that the District Court erred in ordering the more definite statement. It stated that Rule 9(c), Federal Rules of Civil Procedure, controlled the matter and that its allowance of general allegations of conditions precedent controlled. It thus equated jurisdictional prerequisites, whatever they were ultimately determined to be, with conditions precedent and held the EEOC complaint satisfied Rule 9(c). It therefore concluded the District Court erred in granting the more definite statement and in dismissing. In its opinion, it paid scant attention to the important question of invokation of jurisdiction, merely noting that general subject matter jurisdiction was present. It stated that if Petitioner wanted "to join issue" on jurisdiction, it had to do so under Rule 9(c). It did not explicate why it concluded that the existence of facts necessary to meet jurisdictional prerequisites was a condition precedent in its opinion.

REASONS FOR GRANTING THE WRIT

I. THE DECISION HEREIN IS OF IMPERATIVE PUBLIC IMPORTANCE TO THE PROPER PLEADING AND DISPOSITION OF SUITS BY THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED.

A. IN LIGHT OF THE SUBSTANTIAL NUMBER OF SUITS INVOLVING THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS PLAINTIFF, AN EARLY DETERMINATION SHOULD BE MADE ON THE ISSUE OF PROPER PLEADING OF JURISDICTIONAL PREREQUISITES FOR SUCH SUITS.

Pursuant to its statutory authority, 42 U.S.C. §2000e-5(f)(1) the EEOC has filed hundreds of suits in the district courts against employers and labor unions alleging violations of the Civil Rights Act of 1964, as amended.[2/] Basic to all these suits is the essential question of

2/ In a speech reported in the May 20, 1974, B.N.A. Labor Relations Reporter, "News and Background Information", 86 LRR 48, the Chairman of the EEOC noted that 286 suits were in litigation.

what facts must be plead to establish jurisdiction in the district courts. Basic also is the question of how these facts must be plead. The tension is between the requirements of Rule 8(a)(1), Federal Rules of Civil Procedure, and Rule 9(c) thereof. The former requires that "a pleading which sets forth a claim for relief. . .shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . ." The latter provides that "In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred." Essential to resolving the tension is the determination of what are conditions precedent, that is, are certain actions jurisdictional prerequisites which must be specifically and factually plead to establish "the grounds upon which jurisdiction depends" or are they "conditions precedent" satisfaction of which can be plead generally?

This question has been presented to and decided by a number of district courts[3/]

3/ Compare EEOC v. Western Electric Co., 364 F.Supp. 188 (D. Md. 1973); EEOC v. Guaranty Savings & Loan Assoc., 369 F. Supp. 36 (N.D. Ala. 1973); EEOC v. Container Corp. of America, 352 F.Supp. 262

and two courts of appeals.4/ It has produced a marked division of opinion among these courts as shown by the varied results indicated in the footnote. It is obvious that this is a recurrent issue which will continue to demand the attention of the lower courts, with probably varying results, unless and until this Court decides the issue. It thus appears imperative, and consistent with sound

3/ cont.
(M.D. Fla. 1972); EEOC v. Kimberly-Clark Corp., 6 FEP Cases 1009 (W.D. Tenn. 1973), 7 FEP Cases 666 (W.D. Tenn. 1974); EEOC v. Wagner Electric Corp., 7 FEP Cases 98 (E.D. Mo. 1973); EEOC v. Chrysler Corp., 8 FEP Cases 343 (S.D. Ohio 1974) with EEOC v. Bartenders Int'l. Union, etc., 369 F. Supp. 827 (C.D. Cal. 1973); EEOC v. Missouri Pacific R. Co.,6 FEP Cases 593 (W.D. Tenn. 1973); EEOC v. Laclede Gas Co., 6 FEP Cases 1282 (E.D. Mo. 1973); EEOC v. Eagle Iron Works, 367 F.Supp.817 (S.D. Iowa 1973); EEOC v. General Electric Co., 370 F.Supp. 1258 (W.D. Va. 1973). There are doubtless other cases, but these are illustrative.

4/ In addition to the Fifth Circuit, this issue has been resolved, in the same fashion, by the Ninth Circuit in EEOC v. Wah Chang Albany Corp., 8 FEP Cases 203 (9 Cir. 1974).

judicial policy, that this Court accept jurisdiction herein and render a decision which will guide the lower courts in correctly resolving this threshhold issue in the hundreds of EEOC suits now pending and yet to be filed. Only by such a decision can there be a speedy, conclusive resolution of this important recurrent issue. Such a resolution will materially advance the proper disposition of these suits which are of vital public importance, not only to the litigants, but also the thousands of employees and union members whose rights and responsibilities will be materially affected by the results of these suits.

B. IN VIEW OF THE LIMITED JURISDICTION OF FEDERAL COURTS, A DECISION SHOULD BE MADE DETERMINING WHETHER SATISFACTION OF STATUTORY CONDITIONS PRIOR TO SUIT IS A CONDITION PRECEDENT OR IS A JURISDICTIONAL PREREQUISITE AND HOW SUCH SATISFACTION SHOULD BE PLEAD.

This Court appears never to have decided a case determining what is a "condition precedent" which is subject to the provisions of Rule 9(c), Federal Rules of Civil Procedure. Thus, there is an absence of final authority on this thresh-

hold pleading issue which has no doubt contributed to the varying results reached in the lower courts' rulings 5/ on initial motions to dismiss or for more definite statements concerning the jurisdictional grounds for EEOC suits. This void of authority needs to be filled by a definite decision by this Court.

The lower courts have taken diametrically opposed positions on the issue of what is a "condition precedent". In the instant case, the District Court inherently rejected the claim that satisfaction of the statutory commands could be generally avered under Rule 9(c). The Court of Appeals reached an opposite conclusion, but gave no reason or rationale for its result, simply declaring the matter could be plead under Rule 9(c). The Ninth Circuit only declared that "the procedural steps that must be taken before suit may be prosecuted are most reasonably considered conditions precedent", EEOC v. Wah Chang Albany Corp., supra, at 204. The District Court in EEOC v. Guaranty Savings & Loan Assoc., supra, at 37, concluded "that Rule 9(c) applies to the performance or occurrence of conditions precedent to liability, but does not apply to matters which affect the court's

5/ See footnotes 3 and 4.

jurisdiction". It found that jurisdiction was not sufficiently alleged by a general statement, but rather what was required was the specific allegations that all statutory steps in the processing of a charge by the EEOC had been met as these were "jurisdictional in nature". Ibid.

There is little in the legal literature which helps in defining a "condition precedent" in the instant context. However, what there is suggests the Fifth and Ninth Circuits reached an erroneous result. It has been stated that "a condition precedent is something essential to the right asserted". C. C. Wheaton, "Pleading Conditions Precedent and Subsequent", 27 Georgetown Law Journal 1071 (1939) (emphasis supplied). Citing C.Corbin, "Conditions in the Law of Contract", 28 Yale Law Journal 739 (1919), Wheaton further states "a condition precedent is an operative fact that must have being prior to the existence of some legal relation in which one is interested". Ibid. (emphasis supplied). Similarly, Clark has defined conditions precedent as "conditions to be performed by the plaintiff precedent to the defendant's duty", C.E. Clark, Handbook of the Law of Code Pleading, 2d Ed. (1947), at 280 (emphasis supplied).

It thus appears that a condition precedent is something having to do with the creation of a "right" or "legal relation" or "duty", not the satisfaction of some requirement of jurisdiction. The performance or occurrence of conditions precedent seem to relate directly to the question of whether the plaintiff has a cause of action, not whether a court has jurisdiction of a suit seeking relief on that cause. It is established that the existence of a cause of action and the existence of jurisdiction are separate questions, so that jurisdiction may exist where no cause of action exists. Bell v. Hood, 327 U.S. 678 (1946). The reverse would appear to be obviously true, e.g., a good cause of action where jurisdiction was asserted to exist on diversity grounds, but the amount in controversy was only $1,000.00, would not be within the jurisdiction of a federal district court.

Thus here there is no contention that performance by the EEOC of the statutory requirements of charge, notice, investigation, determination of reasonable cause, and conciliation, see 42 U.S.C. §2000e-5(b), (f)(1), was necessary to create any "right" on behalf of protected minority groups or any "duty" devolving upon

Standard Forge under 42 U.S.C. §2000e-2. The "legal relation" of Standard Forge to its employees is fixed by the law, irrespective of any action or inaction by the EEOC. The EEOC acts only to enforce the duties and protect the rights arising from the legal relationship of employer and employee under the law. In its actions, the EEOC is commanded to follow certain statutory procedures, but those procedures do not effect the existence of the rights or duties, only one mode of enforcing them. Rule 9(c) seems to have no relevance in this respect as the completion of the statutory steps, if required before suit, is the "performance of procedural requirements for filing the claim", a matter to which the Rule does not apply by its terms. C.A. Wright and A. R. Miller, Federal Practice and Procedure, Vol. 5, p. 429-430.

That the performance by the EEOC of the statutory steps is a matter which must be alleged factually under Rule 8(a)(1) rather than as a condition precedent under Rule 9(c) is further suggested by this Court's decision in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). There this Court was concerned not only with questions on burden of proof, but also ruled directly on what acts had to be

done by a private litigant before he could invoke the jurisdiction of a federal district court under Title VII. There the Court rejected the argument that a reasonable cause determination by the EEOC on the claim of the private litigant was necessary to allow him to maintain his suit. Rather the Court held that the only two "jurisdictional prerequisites to a federal action" were the filing of timely charges with the EEOC and receipt of and action upon the EEOC's notice of a right to sue. Ibid., 798. The Court there did not characterize these two necessary acts as conditions precedent, but rather clearly labeled them "jurisdictional prerequisites", that is, acts whose performance had to have occurred and been specifically alleged in order to invoke the otherwise general subject matter jurisdiction of the federal courts under 42 U.S.C. §2000e-5(f)(3). Similarly, the performance by the EEOC of statutorily provided steps in the processing of a charge prior to suit by the EEOC, if required for a suit to be maintainable, is a matter of the existence of "jurisdictional prerequisites", not the performance of any condition precedent. It is a question of whether the case is ripe for judicial review, not whether some right has been violated or duty not

discharged by an employer.

The questions presented are particularly acute in view of the limited jurisdiction of the federal courts. These courts have no jurisdiction except that specifically conferred on them by law and the existence of that jurisdiction must affirmatively appear and cannot "be inferred argumentatively from averments in the pleadings. . .the averments should be positive". Grace v. American Central Ins. Co., 109 U.S. 278, 283-284 (1883). The existence of jurisdiction "must be determined from the complaintant's statement of his own cause of action" and must be based upon a ground "affirmatively and distinctly set forth". Shulthis v. McDougal, 225 U.S. 561, 569 (1912). Where there are "prerequisites to the exercise of jurisdiction", then these "are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. He must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing." McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936). It is not sufficient to allege conclusions of law, rather the facts must be alleged and the court determines the conclusions, that

is, here, whether jurisdiction exists or not based upon what the EEOC has or has not done under the statutory scheme. Little York Gold Washing & Water Co. v. Keyes, 96 U.S. 199 (1877). In view of these basic requirements in regard to the pleading of jurisdiction, it appears more appropriate that the performance of the various steps in the statutory scheme, to the extent performance is determined to be required, should be alleged specifically and factually under Rule 8(a)(1) rather than allowing the EEOC to make a blanket generalized allegation under Rule 9(c). Upon the facts thus alleged, a district court could make an early determination of the existence or absence of jurisdiction in a particular case, thus serving the ends of the Federal Rules of Civil Procedure, "the just, speedy and inexpensive determination of every action", especially those where, by this procedure, jurisdiction is quickly determined not to exist. Rule 1, Federal Rules of Civil Procedure.

C. A DETERMINATION SHOULD BE MADE ON THE PROPER MODE OF DECIDING WHETHER A COURT HAS JURISDICTION OF AN EEOC SUIT SO THAT SUCH A DECISION CAN BE MADE SPEEDILY AND INEXPENSIVELY.

The cardinal guide in interpreting and applying the Federal Rules of Civil Procedure is that such be done in a manner designed "to secure the just, speedy, and inexpensive determination of every action". Rule 1, Federal Rules of Civil Procedure. In the instant case, faced with challenges to its jurisdiction, the District Court moved specifically to resolve the jurisdictional challenges in a manner it felt would best advance these interests. Its ordering of a more definite statement "was to simplify and expedite the litigation of this cause" by providing detail on the alleged jurisdictional prerequisites. (App. D., infra, pp. 19A). It desired to get jurisdictional facts before it in a manner that was expeditious and would avoid the "unnecessary harassment" of extended discovery with its "hardship and expense" on Petitioner (App. D., infra, p. 20A), but would also cause the EEOC to "suffer no harm" as it would be merely producing discoverable facts in a different and earlier fashion. (App. D., infra, p. 19A).

In attempting to get the facts before it quickly so it could determine if jurisdiction existed, the District Court was following not only the mandates of the Federal Rules, but also the mandate

of the very statute upon which jurisdiction was based. It is required by 42 U.S.C. §2000e-5(f)(5) that cases under Title VII "be in every way expedited". Here the District Court was attempting to do just this, to get the pleadings in proper form and the facts before it expeditiously so that it could make an early and definitive decision on the existence or absence of its jurisdiction which had been challenged by the motions to dismiss.

Thus this Court should decide if the mode used by the District Court was a proper one for determining whether the jurisdictional prerequisites had been met. It should give guidance to the lower courts in regard to the appropriate way to hear and determine these threshhold jurisdictional questions which are obviously of a recurrent nature.6/ Only

6/ See footnotes 3 and 4. These are also many cases in which the courts have actually determined that they do lack jurisdiction for various reasons. See, e.g., EEOC v. Westvaco Corp., 372 F.Supp. 985 (D.Md. 1974); EEOC v. Union Oil Co., 369 F.Supp. 579 (N.D. Ala. 1974); EEOC v. Missouri Pacific R. Co., 493 F.2d 71 (8 Cir. 1974); EEOC v. Huttig Sash & Door Co., 371 F.Supp. 848 (S.D. Ala. 1974).

Only by giving express guidance can this Court fulfill the desire of Congress that EEOC suits be expeditiously handled and decided. If no such early guidance is forthcoming, there will continue to be confusion and division on this point, with each district court deciding itself how to handle the matter which can well lead to delays in the processing of these important suits.

Petitioner urges that this Court should approve the approach taken by the District Court, which is the same approach taken by another district court, see EEOC v. Kimberly-Clark Corp., supra. As was stated in the Kimberly-Clark case, at 6 FEP Cases 1010, in granting the motion for a more definite statement:

> Under all the circumstances it appears to the Court that this means of requiring plaintiff to give fair notice as to meeting statutory conditions, once this jurisdictional question has been raised, is the most efficient and prompt means to enable the Court to rule on the merits of defendant's contentions preliminary to a hearing on the merits as and if required.

It is clear that generally the trial courts have wide discretion in determining whether jurisdiction exists. "(T)he trial court is not bound by the pleadings of the parties, but may, of its own motion, if led to believe that its jurisdiction is not properly invoked, inquire into the facts as they really exist." Wetmore v. Rymer, 169 U.S. 115, 120 (1898). The mode of determining an issue of jurisdiction is generally left to the trial court. Gibbs v. Buck, 307 U.S. 66(1939). The trial court has the power to select, in its discretion, the method to be used in determining whether it in fact has jurisdiction. Land v. Dollar, 330 U.S. 731 (1947). This could be done, e.g., by requiring a more definite statement, requiring affidavits, having an evidentiary hearing, etc.

It would appear that the mode selected below was a proper one in view in the District Court's discretion in selecting the mode of determination of jurisdiction as well as its discretion in granting more definite statements. The discretion to grant a more definite statement must be a sound and considered discretion, but it is also a broad one. Mitchell v. E-Z Way Towers, Inc., 269 F.2d 126 (5 Cir. 1959). There was no abuse of discretion

because of the fact that the details sought by the more definite statement were also discoverable. This does not preclude their elicitation in a more definite statement. Wright & Miller, supra, Vol. 5, p. 738. In fact, it is entirely appropriate to grant a more definite statement in an attempt to resolve threshhold offenses as this satisfies the goal of speedy decision of cases. Ibid, 743.

Thus, it appears this Court should give guidance to the lower courts in regard to the appropriate procedures for deciding challenges to jurisdiction in EEOC suits. It would appear that the procedure used by the District Court herein was at least an appropriate one and this Court should so indicate, together with indicating any other alternative procedures.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Certiorari should be granted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 19th day of September, 1974, caused the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit to be served upon the following individuals as counsel for parties to the case below by causing three copies thereof for each such party to be deposited in the U.S. Mail, postage prepaid:

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APPENDIX A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellant,

v.

STANDARD FORGE AND AXLE COMPANY, INC., Defendant-Appellee.

No. 73-3580.

United States Court of Appeals, Fifth Circuit.

July 15, 1974.

The Equal Employment Opportunity Commission brought action against employer for judicial redress of alleged discrimination in employment. The United States District Court for the Middle District of Alabama, Robert E. Varner, Jr., dismissed the action with prejudice and the Commission appealed. The Court of Appeals held that allegation by the Commission that all conditions precedent to the institution of the lawsuit had been fulfilled was sufficient compliance with rule of civil procedure pertaining to pleadings of conditions precedent and the employer was not entitled

to a more definite statement of the Commission's compliance with each statutory jurisdictional requirement.

Reversed and remanded.

Appeal from the United States District Court for the Middle District of Alabama.

Before DYER and MORGAN, Circuit Judges, and KRAFT, District Judge.

DYER, Circuit Judge:

We are called upon to untangle what should have been a relatively simple pleading problem. The district court dismissed this action because the Equal Employment Opportunity Commission declined to comply with the court's order requiring it to allege in detail that the Commission had fulfilled each of the administrative steps established by section 706 of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C.A. §2000e-5. Finding that a general averment in the complaint that all conditions precedent had been satisfied was sufficient for pleading purposes, we reverse.

The EEOC brought this action against

Standard Forge on a charge that the company had engaged in discriminatory employment practices. After the invocation of jurisdiction under the appropriate statutes,[1] the complaint alleged that the action was expresssly authorized by section 706(f)[2] In the Commissions' view, only the provisions of section 706(f) could be considered conditions precedent, hence its complaint contained the following allegations:

> Charges have been filed with the Equal Employment Opportunity Commission, by a former Commissioner (Alexander) and by a person claiming to be aggrieved, more than thirty (30) days prior to the institution of this suit alleging a violation of Title VII by Standard Forge.

1/ 28 U.S.C.A §§451, 1343 and 1345.

2/ This section provides in pertinent part: "If within thirty days after a charge is filed with the Commission. . . the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent. . . ."

All conditions precedent to the institution of this lawsuit have been fulfilled.

Disagreeing with the EEOC's position that the only conditions precedent were those embodied in section 706(f), Standard Forge moved that the Commission "be required to state completely and exactly compliance with each statutory jurisdictional requirement - timely charge, notice, investigation, reasonable cause determination, conciliation and timeliness of suit." This motion for a more definite statement pursuant to Rule 12(e) of the Federal Rules of Civil Procedure was based on the company's assertion that Rule 8(a)(1) requires a factual allegation of all the "jurisdictional prerequisites" of section 706, including those specified in section 706(b).[3/] The

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3/ The pertinent part of that subsection provides:

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer. . .has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circum-

district court granted the motion for a more definite statement.

Although the Commission maintained that section 706(b) merely delineated the administrative process to be followed by the EEOC prior to the commencement of a civil action, it attempted to comply with the district court's order by substituting the following allegation for the general averment that all conditions precedent had been fulfilled:

> The Commission, after investigating and finding reasonable cause to believe the truth of the charges, has been unable, through informal methods of conference, conciliation and persuasion, to eliminate the unlawful practices or to secure a conciliation agreement acceptable to it.

3/cont.
stances of the alleged unlawful employment practice) on such employer. . .within ten days, and shall make an investigation thereof. . . .If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, concilation, and persuasion.

The district court, however, was unsatisfied with the amended pleading. It seemed to frown upon "conclusory allegations of matters such as jurisdictional conditions precedent," and concluded that the EEOC's failure to state "what facts constitute the conditions precedent" made the complaint vague and ambiguous and thus subject to a motion for a more definite statement. The court ordered the Commission to provide the following information which would reveal whether the provisions of section 706(b) had been met:

> In regard to the individual charge (a) the date of the alleged unlawful employment practice and the date the charge was filed; (b) that the charge was properly sworn; (c) that proper notice was issued to Standard Forge & Axle Company, Inc., and the date of said notice; (d) that an adequate investigation was made, the name of said investigator; and the dates the said investigation started and ended; (e) that a legitimate reasonable cause determination was made and a brief statement of the evidence alleged to constitute reasonable cause; (f) that a conciliation took place between the parties, specifying the name of the conciliator(s),

the date or dates of conciliation and that the Plaintiff made a good faith reasonable effort; and (g) the date the charge was filed and the date the suit was filed.

In regard to the Commissioner's charge (a) the basis of the Commissioner's reasonable cause to believe the Defendant was in violation of the applicable act and the facts upon which the charge was premised; (b) the date the charge was filed and the bases for alleging the alleged offense to be continuing; (c) that proper notice was issued to Defendant and the date of said issuance; (d) that a proper investigation was made, the name of said investigator, the place and the manner of the investigation, and the dates the said investigation started and ended; (e) that a legitimate reasonable cause determination was made and the date and basis of the determination; (f) that a conciliation took place between the parties, specifying the name of the conciliator(s), the date or dates of conciliation and that the Plaintiff made a good faith reasonable effort, and (g) the date the charge was filed and the date the suit was filed.

The EEOC declined to comply with the district court's order, and as a consequence the suit was dismissed with prejudice pursuant to Rule 41(b).

In this appeal the Commission asserts first that the lower court erred since its order implicitly assumed that each of the steps in section 706 was a condition precedent to bringing suit. Second, the Commission contends that the court improperly inquired into matters over which the judiciary has no power of review, for example, whether the EEOC made a "good faith reasonable effort" at conciliation. Finally the Commission argues that regardless of whether compliance with each step specified in section 706(b) is a condition precedent, the district court erred in employing Rule 12(e) to require a highly detailed allegation of satisfaction of the conditions precedent.

[1,2] We easily dispose of tne Commission's first argument since the district court explicitly disclaimed any attempt at resolving the question of whether any or all of the procedures set out in section 706 are conditions precedent. We decline to reach the merits of an issue on which the district court has not ruled. See, e.g., Hormel v. Helvering,

1941, 312 U.S. 552, 61 S.Ct. 719, 85 L.Ed. 1037.

Similarly, we are unwilling to address the merits of the Commission's contention that the lower court exceeded the scope of permissible judicial review by inquiring into matters which are solely within the administrative discretion of the EEOC. Determination of this issue is pretermitted by our conclusion that the court abused its discretion by granting the motion for a more definite statement and by formulating highly detailed inquiries which were inappropriate at that state of the action.

No challenge is made to the district court's having subject matter jurisdiction over this controversy. The complaint specified the statutes which conferred jurisdiction on the court, and the factual allegations are not attacked as being immaterial or insubstantial. Bell v. Hood, 1946, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939. While Standard Forge does not contest the district court's subject matter jurisdiction, it argues that the EEOC cannot invoke the court's jurisdiction until it has factually alleged compliance with each provision of section 706. We disagree.

[3,4] What may or may not be conditions precedent to the Commission's right to seek judicial redress of a Title VII grievance, cf. Sanchez v. Standard Brands, Inc., 5 Cir. 1970, 431 F.2d 455; Miller v. International Paper Co., 5 Cir. 1969, 408 F.2d 283; Dent v. St. Louis-San Francisco Railway Co., 5 Cir. 1969, 406 F.2d 399, cert. denied, 1971, 403 U.S. 912, 91 S.Ct. 2219, 29 L.Ed.2d 689, must be determined by the district court after the issue is properly presented under the rules of pleading. Rule 9(c) delimits the requirements of specificity concerning conditions precedent: "In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred." Should a defendant desire to join issue on the existence or satisfaction of conditions precedent, his burden is clearly specified by the second sentence of the same rule: "A denial of performance or occurrence shall be made specifically and with particularity."

In the case now before us, the original complaint fully complied with the requirements of Rule 9(c). Standard Forge was not entitled to further information in framing its response to the EEOC's com-

plaint, and the motion for a more definite statement should have been denied. The district court erred in dismissing the complaint.

Reversed and remanded.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1973

No. 73-3580

D. C. Docket No. CA-4036-N

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

versus

STANDARD FORGE AND AXLE COMPANY, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Alabama

Before DYER and MORGAN, Circuit Judges, and KRAFT, District Judge.

J U D G M E N T

This cause came on to be heard on the

transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that plaintiff-appellant, pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

July 15, 1974

Issued as Mandate:

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	)
v.	) CIVIL ACTION NO.
STANDARD FORGE & AXLE COMPANY, INC., Defendant.	) 4036-N

O R D E R

This cause is now submitted upon Plaintiff's motion for enlargement of time and for reconsideration filed herein July 7, 1973.

Upon consideration of said motion and hearing held thereon July 25, 1973, this Court is of the opinion that the Plaintiff has not sufficiently set forth the

necessary facts. Accordingly, it is the

ORDER, JUDGMENT and DECREE of this Court that Plaintiff provide by more definite statement the following information:

1. In regard to the individual charge (a) the date of the alleged unlawful employment practice and the date the charge was filed; (b) that the charge was properly sworn; (c) that proper notice was issued to Standard Forge & Axle Company, Inc., and the date of said notice; (d) that an adequate investigation was made, the name of said investigator, and the dates the said investigation started and ended; (e) that a legitimate reasonable cause determination was made and a brief statement of the evidence alleged to constitute reasonable cause; (f) that a conciliation took place between the parties, specifying the name of the conciliator(s), the date or dates of conciliation and that the Plaintiff made a good faith reasonable effort; and (g) the date the charge was filed and the date the suit was filed.

2. In regard to the Commissioner's charge (a) the basis of the Commissioner's reasonable cause to believe the Defendant was in violation of the applicable act and the facts upon which the charge was

premised; (b) the date the charge was filed and the bases for alleging the alleged offense to be continuing; (c) that proper notice was issued to Defendant and the date of said issuance; (d) that a proper investigation was made, the name of said investigator, the place and the manner of the investigation, and the dates the said investigation started and ended; (e) that a legitimate reasonable cause determination was made and the date and basis of the determination; (f) that a conciliation took place between the parties, specifying the name of the conciliator(s), the date or dates of conciliation and that the Plaintiff made a good faith reasonable effort; and (g) the date the charge was filed and the date the suit was filed.

DONE this 31st day of July, 1973.

R. E. VARNER
United States District
Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)
Plaintiff,	)
vs.	)CIVIL ACTION NO.4036-N
STANDARD FORGE & AXLE COMPANY, INC.,	)
Defendant.	)

O R D E R

This cause is now submitted upon Defendant's motion to dismiss filed herein August 30, 1973.

The allegations of the complaint of jurisdiction were that the jurisdictional prerequisites had been met. On the Defendant's motion on July 31, 1973, this Court ordered the Plaintiff to file a more definite statement of the necessary jurisdictional facts. The Plaintiff notified this Court on August 22, 1973,

that said Plaintiff would not comply with this Court's order. Defendant then filed the motion to dismiss under Rule 41(b) which is now submitted.

The Court's order of July 31, 1973, was issued because this Court had serious question as to whether said cause was properly before the Court. Further, the Defendant strongly contended that, once all the facts were produced, this Court would not have jurisdiction of this proceeding. A United States District Court is a court of limited jurisdiction; therefore, the Plaintiff must provide the Court with a statement of the grounds upon which the Court's jurisdiction depends. See Rule 8(a)(1), Federal Rules of Civil Procedure. Sweeping generalities are not sufficient. The test of Conley v. Gibson, 355 U.S. 41, applies to a motion to dismiss [Rule 12(b)] a claim [Rule 8(a)(2)] and not to the statement of jurisdictional facts [Rule 8(a)(1)] when challenged by a motion for more definite statement [Rule 12(e)]. The Plaintiff must allege sufficient jurisdictional facts in order for the Court to have the power to entertain the action. In the case sub judice, the Plaintiff merely stated in sweeping generalities that the jurisdictional prerequisites had been met. This Court

pointed out to the parties in open court that the purpose of its order was to simplify and expedite the litigation of this cause. Obviously, the information would have to be provided during discovery, and this Court was of the opinion that the Plaintiff would suffer no harm by producing said information at an early stage of the proceeding. The jurisdictional allegations were extremely general, and this Court is of the opinion that said allegations did not comply with Rule 8(a)(1) and the applicable statutes when properly challenged by a motion for more definite statement [Rule 12(e)].

Whether or not these generalities survive the tests of Rule 8(a), they are clearly lacking as a sufficiently definite statement under Federal Rules of Civil Procedure, Rule 12(e). The allegations are that jurisdictional prerequisites have been met. This Court has no way to know that the parties are in agreement as to what those prerequisites are, and the Defendant cannot be sure what it must admit or deny in its answer or whether it should move to dismiss because it may believe one jurisdictional fact to be lacking. The Defendant has a right on motion for more definite statement to have the Plaintiff state the facts to be relied

upon by the Plaintiff to the extent that the Defendant may know what the charges against it are so as to intelligently know how to phrase its pleadings. Flemming v. Stillman (DC Tenn. 1941) 37 F. Supp. 236; Cope v. Freyn Eng. Co., 8 F.R.D. 620; Culver v. Bell & Loffland (CCA Cal. 1945) 146 F.2d 29; Faske v. Radbill, 7 F.R.D. 234; Longhman v. Pitz, 29 F.Supp. 882; Sierocinski v. DuPont Co., 25 F.Supp. 706. If, in fact, a jurisdictional fact is lacking, a defendant may be put to much unnecessary hardship and expense if he is required to develop the missing link by discovery. The purpose of proper pleading is to avoid such unnecessary harassment.

Upon consideration of said cause, this Court is of the opinion that the Plaintiff has wilfully violated an order of this Court and that this cause should be dismissed with prejudice pursuant to Rule 41(b), Federal Rules of Civil Procedure. Accordingly, it is the

ORDER, JUDGMENT and DECREE of this Court that said motion to dismiss be, and the same is hereby, granted. It is further

ORDERED that this cause be, and is

hereby, dismissed with prejudice and that all costs incurred in this proceeding be, and are hereby, taxed against the Plaintiff for which execution may now issue.

DONE this 14th day of Sept., 1973.

R.E. VARNER
United States District
Judge

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-310

STANDARD FORGE AND AXLE COMPANY, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

Petitioner contends that the court of appeals erred in holding that the district court had abused its discretion in ordering the Equal Employment Opportunity Commission to make a further more definite statement concerning procedural prerequisites to its right to sue at this time.

1. In May 1973, the Commission filed this action against petitioner in the United States District Court for the Middle District of Alabama seeking relief based on asserted violations of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. (Supp. II) 2000e, *et seq.* In its complaint the Commission invoked various jurisdictional statutes[1] and alleged that

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[1]28 U.S.C. 451, 1343, and 1345.

the action was expressly authorized by Section 706(f) of the Act.[2] The complaint alleged that petitioner was engaged in an industry affecting commerce, that it employed more than 25 persons,[3] and that "[a]ll conditions precedent to the institution of this lawsuit have been fulfilled" (Pet. App. 4-A).[4] The complaint further contained allegations as to violations and a prayer for relief.

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[2]Section 706(f) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. (Supp. II) 2000e-5(f), provides in part:

> (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. * * *
>
> * * * * *
>
> (3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. * * *

[3]An employer must be engaged in an industry affecting commerce and have 25 or more employees (15 after March 1973) to be subject to the Act. 42 U.S.C. (Supp. II) 2000e.

[4]In addition to this general allegation the complaint alleged, with reference to the preconditions for suit specified in Section 706(f), that (Pet. App. 3-A):

> Charges have been filed with the Equal Employment Opportunity Commission, by a former Commissioner (Alexander) and by a person claiming to be aggrieved, more than thirty (30) days prior to the institution of this suit alleging a violation of Title VII by Standard Forge.

Petitioner filed alternative motions under Rules 12 and 56, Fed. R. Civ. P., seeking dismissal of the complaint, a more definite statement, or summary judgment. The district court denied the motions to dismiss and for summary judgment but granted the motion for a more definite statement under Rule 12(e), Fed. R. Civ. P. The Commission proposed to amend its complaint to comply with the district court's order by including several general allegations about the administrative process.[5]

The district court, however, ordered the Commission to provide by a further more definite statement extensive details regarding the administrative process preceding the Commission's decision to sue (Pet. App. 14-A to *16-A*).[6] The Commission declined to comply with the order and the district court dismissed the case (Pet. App. 17-A to 21-A).

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[5]The amendment stated (Pet. App. 5-A):

> The Commission, after investigating and finding reasonable cause to believe the truth of the charges, has been unable, through informal methods of conference, conciliation and persuasion, to eliminate the unlawful practices or to secure a conciliation agreement acceptable to it.

[6]The order required the Commission to allege (Pet. App. 6-A to 7-A):

> In regard to the individual charge (a) the date of the alleged unlawful employment practice and the date the charge was filed; (b) that the charge was properly sworn; (c) that proper notice was issued to Standard Forge & Axle Company, Inc., and the date of said notice; (d) that an adequate investigation was made, the name of said investigator; and the dates the said investigation started and ended; (e) that a legitimate reasonable cause determination was made and a brief statement of the evidence alleged to constitute reasonable cause; (f) that a conciliation took place between the parties, specifying the name of the conciliator(s), the date or dates of concilia-

The court of appeals reversed and remanded, holding that the district court had abused its discretion "by granting the motion for a more definite statement and by formulating highly detailed inquiries which were inappropriate at that stage of the action" (Pet. App. 9-A; 496 F. 2d 1392, 1394).

2. The petition presents only a question of proper pleading.[7] As the district court recognized in initially denying the motion to dismiss for lack of jurisdiction, the complaint alleged sufficient facts to establish the jurisdiction of the court to hear the case. And, as the court of

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tion and that the Plaintiff made a good faith reasonable effort; and (g) the date the charge was filed and the date the suit was filed.

In regard to the Commissioner's charge (a) the basis of the Commissioner's reasonable cause to believe the Defendant was in violation of the applicable act and the facts upon which the charge was premised; (b) the date the charge was filed and the bases for alleging the alleged offense to be continuing; (c) that proper notice was issued to Defendant and the date of said issuance; (d) that a proper investigation was made, the name of said investigator, the place and the manner of the investigation, and the dates the said investigation started and ended; (e) that a legitimate reasonable cause determination was made and the date and basis of the determination; (f) that a conciliation took place between the parties, specifying the name of the conciliator(s), the date or dates of conciliation and that the Plaintiff made a good faith reasonable effort, and (g) the date the charge was filed and the date the suit was filed.

[7]Much of the controversy below centered on whether Section 706(b) of Title VII (see Pet. 3-4) prescribes jurisdictional facts or conditions precedent to suit or whether, as the Commission urged, it merely delineates the procedural framework for the Commission's informal resolution of unlawful employment practices. The court of appeals found it unnecessary to resolve this issue (Pet. App. 8-A), and it is not before the Court at this time.

appeals noted, the "complaint specified the statutes which conferred jurisdiction on the court, and the factual allegations are not attacked as being immaterial or insubstantial. *Bell* v. *Hood,* 1946, 327 U.S. 678 * * * " (Pet. App. 9-A). The requirement of Rule 8(a)(1), Fed. R. Civ. P., of "a short and plain statement of the [jurisdictional] grounds" of the action had thus been met.

As the court of appeals noted, the district court had viewed the Commission's pleading as deficient in that it contained " 'conclusory allegations of matters such as jurisdictional conditions precedent' " (Pet. App. 6-A) and had ruled "that the EEOC's failure to state 'what facts constitute the conditions precedent' made the complaint vague and ambiguous and thus subject to a motion for a more definite statement" (*ibid.*). The court of appeals properly rejected both the district court's premise and its conclusion since they were based on a misconception of how conditions precedent, or jurisdictional prerequisites, are to be pleaded. Under Rule 9(c), Fed. R. Civ. P., it is entirely appropriate to plead the performance or occurrence of such matters "generally".[8] The district court's order would have required allegations of evidentiary detail available through discovery, contrary to the basic principles of notice pleading underlying the Federal Rules of Civil Procedure.

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[8]See also Rule 9(d), Fed. R. Civ. P., providing that "[i]n pleading an * * * official act it is sufficient to aver that * * * the act [was] done in compliance with law." By contrast, as the court of appeals correctly noted (Pet. App. 10-A), to join issue on the question whether preconditions to suit have been performed, the defendant must deny their performance "specifically and with particularity." Fed. R. Civ. P. 9(c).

The decision of the court of appeals in this case is in accord with the ruling of the Ninth Circuit in a similar case that the matters in issue here may be alleged generally pursuant to Rule 9(c). *Equal Employment Opportunity Commission* v. *Wah Chang Albany Corp.*, 499 F.2d 187, 189-190 (C.A. 9). It does not conflict with the decision of any other court of appeals and presents no issue warranting review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1975.

DOJ-1974-12